United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1213

To be argued by
BART M. SCHWARTZ

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1213

UNITED STATES OF AMERICA,
Appellee,

—v.—

MICHAEL GLAZER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

BART M. SCHWARTZ,
T. BARRY KINGHAM,
Assistant United States Attorneys, Of Counsel.

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Michael Glazer appeals from a judgment of conviction entered on May 28, 1975, in the United States District Court for the Southern District of New York after a one week trial before the Honorable Lloyd F. MacMahon, United States District Judge and a jury.*

Indictment 75 Cr. 151, filed on February 13, 1975, in nine counts, charged Michael Glazer and five others with two counts each of submitting false documents to the Federal Department of Housing and Urban Development (Title 18, United States Code, Section 1001) and one count each of conspiracy to violate Title 18, United States Code, Section 1001 (Title 18, United States Code, Section

* Defendant Jack Kay a/k/a Jack Kaps filed a notice of appeal but has not filed a brief.

371). In addition, co-defendant Scher was charged with two counts of perjury (Title 18, United States Code, Section 1623).

Trial against Glazer and Kay * commenced on April 21, 1975, and on April 25, 1975, the jury found Glazer guilty on one substantive charge (Count 7) and not guilty on the conspiracy charge (Count 1). The jury was unable to reach a verdict on the other substantive charge (Count 6). Kay was convicted on all counts. On May 28, 1975, Judge MacMahon sentenced Glazer to a 3-month term of imprisonment and a $10,000 committed fine.**

Glazer is enlarged on bail pending appeal.

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* On the day trial was to commence co-defendant Wagner pleaded guilty to Count One (the conspiracy count) and on May 28, was sentenced to a 15-day term of imprisonment and a $7,500 committed fine. On the same dates co-defendant Sinigaglia also pleaded guilty to the conspiracy count and was sentenced to a 6-month term of imprisonment with execution of sentence suspended. Also, on the same dates Scher pleaded guilty to Count Nine (a perjury count) and was sentenced to a $5,000 committed fine. Prior to commencing the trial on April 21, 1975, the Court dismissed the case against co-defendant Marks on motion of his attorney after the Government stated that it intended to seek to file a *nolle prosequi* as to him.

** On the same date Judge MacMahon sentenced Kay to a 6-month term of imprisonment and a $2,500 committed fine on each count to run concurrently.

Statement of Facts

The Government's Case

A. Introduction

The proof at trial established that in 1973 Universal Metal Chain Company (Universal), a large manufacturing company, was arranging for its relocation from a federally financed urban renewal area in Brooklyn, New York to Clifton, New Jersey (Tr. 21-23).* Universal retained Dennis Green as its consultant on this move and Green represented the company in its negotiations with all contractors and Government agencies (Tr. 61, 263). Wagner and Kay approached Green and offered a $6,000 kickback to the owner of Universal in exchange for which Wagner and Kay would be permitted to control the competitive bidding procedures thereby insuring that they would be the low bidder (GXT 14, 15). Thereafter, the $6,000 was paid and Wagner and Kay recruited the defendant and another bidder who agreed to submit high bids (GXT 21). Due to circumstances beyond Wagner's and Kay's control, a second round of bids was required and the same companies submitted bids.

To carry out the scheme and to insure that Wagner and Kay were the winning bidder the conspirators filed false and fraudulent bid forms (GX 1-6) and also schemed to file a false contractor's assignment form (GX 11) which would have been filed after the moving job was completed.

The scheme was unsuccessful because Dennis Green brought it to the attention of law enforcement authorities when Kay and Wagner first approached him concerning

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* Tr. refers to the trial transcript. GX refers to Government Exhibit. GXT refers to the transcripts of tape recordings received as Government Exhibits.

the Universal move and Green permitted the Government to electronically monitor and record all his contacts with Kay and Wagner.*

B. The Roles of the Conspirators

Dennis Green operated Businessman's Relocation Service of New York, Inc. (Businessman's) which acted as an exclusive consultant to commercial tenants displaced by Government relocation projects (Tr. 52-54). Green assisted Universal in arranging for relocation by filing necessary documents with Government agencies and dealing with the moving contractors doing the physical relocation work (Tr. 61-62). For these services Green received his customary nominal fee from the tenant, Universal, and 10 percent of the contract price between the tenant and each contractor (Tr. 53).

On November 6, 1973, at the request of Jack Kay, Dennis Green met with Kay and Wagner at Green's Manhattan office. At this meeting there was a general discussion of Kay's and Wagner's interest in being the commercial movers for the Universal job and their ability to use their influence to help Dennis Green in his dealings with the New York City administration (Tr. 65-76; GXT 14). (Green's federal conviction had caused him some problems in representing tenants before City agencies.) In response to Kay's statement that he had influence in the City administration, Green mentioned that Universal had just been disallowed $12,000 in moving expenses by the City of New York (Tr. 76). Kay and Wagner wanted to think about it to see if they could help Universal with the $12,000 loss (GXT 14).**

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* At the time Green had already been convicted and sentenced on Indictment 72 Cr. 685 charging him with mail fraud.

** Although this was a federal urban renewal project, the City of New York was administering this aspect of the program. All documents submitted to the City were thereafter submitted to the Federal Government.

At the next day's meeting Kay and Wagner proposed an arrangement whereby they would give $6,000 in cash to Green for payment to the owner of Universal as compensation for the $12,000 loss. In return, they wanted Green to permit them to select the other companies which would submit sealed bids (Tr. 70; GXT 15).* Kay and Wagner explained they could fix the bidding by obtaining bids from companies which had been involved with them in similar bid rigging in the past and who would cooperate with them now. They further explained that the bidders would be trusted, "stand-up guys"—who would not "give them up" if the scheme were uncovered and they were questioned by law enforcement authorities (Tr. 81-82; GXT 15). There followed a brief discussion concerning falsifying the dates of documents that would have to be filed (Tr. 83; GXT 15) and Wagner concluded by telling Green that the rigged bids, in addition to Wagner's and Kay's would probably be submitted by Stuyvesant Moving Vans, Inc. and Sanford Scher (Tr. 83; GXT 15).** The proof established that the defendant, Glazer, was the owner and chief operating officer of Stuyvesant (Tr. 227).

At a prearranged time on November 26 the owner of Universal, Richard Laupot, Green, Wagner and Kay met at Green's office. Laupot expressed his fear about signing the contractor's assignment form (GX 11; GXT 17) which stated that he did not receive any money directly or indirectly from the movers when in fact he was going to receive $6,000 (Tr. 87, 265; GXT 17). Wagner refused to discuss the matter and stepped into a hallway outside Green's office with Green. Wagner told Green that Laupot asked too many questions and it would cause a problem to explain the entire scheme to him. Wagner said all the

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* Under the City's procedure it is the responsibility of the tenant to contact the contractors who, using official forms furnished to the tenant by the City, submit their bids.

** Wagner explained that although he and Kay were partners, their bid would be submitted in the name of only one of them.

dealings would be through Green and not directly with Laupot (Tr. 87-89).* Apparently unknown to Wagner, Kay who had remained in Green's office with Laupot, was describing the entire scheme to Laupot. Kay told Laupot not to worry about the form even though it states that no collusion exists. Kay told Laupot that since he and Wagner were dealing through Green, Laupot would be able to go into any court in the country and raise his right hand denying involvement in the kickback. Kay mused that he wished he had a dollar for everyone who signed one of these forms in a similar situation. Stating that "there are many ways to skin a cat" Kay assured Laupot that they would successfully control the sealed bids and select the low bidder. Finally, Kay told Laupot that he could ask others in the industry and others who had been moved by Kay under similar circumstances whether Kay lived up to his commitments to pay a kickback (Tr. 266-271; GXT 17). Thereafter, Wagner and Green returned to Green's office from the hallway. The meeting was concluded with arrangements made for Laupot, Kay and Wagner to meet at Universal's premises to inspect the moving job (Tr. 89, 271; GXT 17).

On November 29 at Laupot's office at Universal's premises, Kay, in Wagner's presence, again assured Laupot that they had conducted business affairs in this manner many times before and that the cash would be passed directly to Green wthout involving Laupot (Tr. 271-272; GXT 18). Wagner explained that he would be the low bidder in a joint venture with Experienced Machinery Movers (defendant Sinigaglia) and reiterated that the other bidders could be trusted not to underbid him (Tr. 90-93, 271-272; GXT 18, 19).

On December 6, 1973, Wagner and Sinigaglia met Green at Green's office. At the meeting Green had his

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* Due to an equipment malfunction this one brief conversation in the hallway was not recorded (Tr. 257).

Businessmans contract dated December 6 (GX 10), three official bid forms and envelopes (GX 2-7) and the Contractor's Assignment already signed by Laupot (GX 11).* Wagner and Sinigaglia refused to sign Green's dated contract noting that it would look suspicious to anyone examining the papers in the future when they see that the contract was entered into before the bids were opened on December 13. Wagner also refused to carry all three bid forms and envelopes to the restaurant claiming that having all three forms in his hands was "dynamite" (Tr. 97-101; GXT 21).

They agreed to go to a local restaurant for lunch, but before doing so Wagner gave Green two lists of "satisfied" customers, one on his letterhead (Tr. 100; GX 12A) and the other on Kay's (Tr. 100; GX 12B), which had been promised by Wagner and Kay to Laupot to demonstrate that Wagner and Kay met their commitments (Tr. 269-70; GXT 17).

At the restaurant, while seated at a table with Sinigaglia and Green, Wagner handed Green $6,000 in cash in an envelope (GX 13) cautioning him to give it to Laupot (Tr. 105-6; GXT 21). Shortly thereafter Wagner and Sinigaglia finally signed Green's dated contract and the contractor's assignment (Tr. 108). Wagner then took the bid forms and envelopes (Tr. 110) and advised Green that he would arrange to have a loser present at the public bid opening to give the bidding a look of legitimacy (Tr. 110-111; GXT 21).

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* The bid forms and envelopes were marked with ink visible to the naked eye under ultraviolet light. The markings on GX 3 and 6 (Glazer's bids) were demonstrated to the jury thus establishing that Stuyvesant's bid forms came from Wagner who received them from Green.

On December 11 Wagner telephoned Green and confirmed that Stuyvesant and Sanford would be the two high bidders in addition to the Wagner-Experienced joint venture low bid (Tr. 113). Wagner told Green that Kay had been able to obtain New York City's secret estimate of the fair cost of the machinery moving aspect of the move. According to Wagner, Kay said the City estimated 40 to 50 thousand dollars and that he would bid between 80 and 90 thousand dollars (Tr. 114). Finally, Wagner said Glazer of Stuyvesant was sending his salesman, Marks, to Wagner and Wagner was then going to go with Marks to inspect Universal's premises (Tr. 114; GXT 22).

Two days later the bids were opened. Present were Green and Wagner and as Wagner had suggested one of the losers, Sanford Scher. All three bids were opened and Wagner and Experienced, had the low bid at $290,000. However, the City did not award the contract because, among other things, all the bidders included in their bids a small part of the plant that had already been moved by another mover and failed to include one building, 161 Clymer Street (Tr. 115-118, 26-29). Later the same day Wagner telephoned Green and advised Green that he had already called each bidder to explain the problems found by the City. Wagner suggested that Laupot or someone from Universal also call the bidders to explain the same facts since that would look legitimate. He told Green that when the Universal representative called Stuyvesant he should ask for either Marks or Glazer because they both were familiar with everything (Tr. 118-120; GX 23). No one from Universal ever did make the call.

On December 18, Wagner and Kay discussed with Green, Kay's political connections and how they would help Green with his problems with the City Administration. Wagner asked Green to have a representative of

Universal call the City to pressure them to award the job so that he would be able to begin the move. Finally, Green told them that he had the new bid forms for the second round of bids.* Wagner agreed to pick up the new bid forms from him (Tr. 120-123) which he did on December 21 (Tr. 124-126).

Thereafter, Wagner advised Green that he was keeping the same bidders for the second round which was scheduled for December 28, 1973 (Tr. 127). On December 28 the second round of bids was opened and again Wagner was the low bidder, this time with a bid of $270,000 (Tr. 127-128, 30-31). The City at this time again did not make a final award of the bids. Eventually the job was awarded to a mover not involved in this case.

C. Stuyvesant

Harvey Marks was employed by Stuyvesant Moving Vans for over two years (Tr. 227). The company was run by its owner, the defendant, Michael Glazer (Tr. 227). Marks' job was to estimate the cost of commercial moves and to advise Glazer in connection with bids and estimates to be submitted to prospective customers (Tr. 227-228). The Universal job first came to the attention of Marks and Glazer in December, 1973, when Wagner came into Stuyvesant's office and told them about it (Tr. 229). Wagner told them that he was bidding on the job and they might want to bid on it also (Tr. 229). After Wagner left Glazer's office Marks expressed his surprise that a competitor would come in and tell them about a job. Glazer just told Marks to look at it and that Stuyvesant would bid on it (Tr. 230).

Thereafter, Marks inspected the Universal site along with Wagner and then discussed the job with Glazer (Tr.

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* Under City law, Green was entitled to have copies of the bids which had been rejected.

231). Marks told Glazer that this was the largest job he had ever seen (Tr. 232). Marks and Glazer, together, determined the price of the bid and Marks prepared the bid proposal form detailing the work to be performed for the bid price (Tr. 232-33; GX 3).

After the first bids were opened by the City, Marks received a telephone call from a City employee advising him that Stuyvesant was not the low bidder and that a second bid would have to be submitted, and among other things, another building, 161 Clymer Street, would have to be included in the move (Tr. 234-235). Thereafter, Marks prepared a second proposal (GX 6) without any discussion with Glazer concerning 161 Clymer Street except to tell Glazer that it was to be included within the proposal this time (Tr. 235-36). Marks did not re-inspect the site nor did he know what work was required to move the contents of 161 Clymer Street because he had not inspected that building on his initial visit (Tr. 237). After preparing the proposal and without any discussion whatsoever with Glazer concerning the changes from the first proposal, Marks submitted the new proposal to Glazer and Glazer alone selected the second bid price (Tr. 235-36). Marks stated that to his knowledge, other than the Universal move, Stuyvesant had never bid on a job without completely inspecting and evaluating the entire site (Tr. 237). Finally, Marks stated that during his employment Stuyvesant never even bid on a relocation job (Tr. 238).*

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* The Government's evidence also included forty-two separate tape recordings and eleven transcripts of certain tape recordings. Of the more than forty hours in recordings approximately forty minutes was played for the jury, and all transcripts were available to them in the jury room during their deliberations.

The Defendants' Cases

Glazer corroborated Marks' testimony that the Universal job was brought to his attention by Wagner and that it was unusual for Stuyvesant to do any relocation work (Tr. 315-319). Glazer admitted that he had to rely on Marks who was the only one who inspected the Universal site (Tr. 324).

Glazer denied any participation in a bid rigging scheme (Tr. 326).

Kay did not testify nor did he call any witnesses in his defense.

ARGUMENT

POINT I

The Judge's charge properly instructed the jury on all the elements of the false statement count.

Defendant claims that the District Court's charge to the jury erroneously described the false statement charged in Count 7, thus permitting the jury to convict the defendant for a statement he did not make and was not charged with making in the indictment. This claim is without merit.

Defendant has unfairly plucked a single line (Tr. 417) from the Judge's charge while ignoring the remainder of the charge (Tr. 415) which *specifically* meets the defendant's argument. He also totally disregards the context and circumstances in which the charge was given.

Simply stated, defendant claims that the Judge instructed the jury they could convict on the substantive count if they found that Glazer falsely certified on the

City bid forms that there had been no agreement to submit a sham or collusive bid when in fact the indictment charged that the false statement was denying being a *party* to such an illegal agreement. No objection was taken to the Judge's charge and for that reason alone the claim of error should be denied. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *(en banc)*, *cert. denied*, 383 U.S. 907 (1966); *United States* v. *Pinto*, 503 F.2d 718 (2d Cir. 1974).

It is obvious from a full reading of Judge's instructions why no objection was made. Just prior to the language quoted by defendant in his brief the Judge clearly stated to the jury that the false statement charged in the Indictment was the defendant's claim that he had not entered into *an agreement with others* to fix the bid:

> Counts 2 and 3 of the Indictment charge that Defendants Kaps and Counts 6 and 7 charge that Defendant Glazer on or about the date set forth in each of those counts, in a matter within the jurisdiction of a department of the United States, the Department of Housing and Urban Development unlawfully, wilfully and knowingly made false, fictitious and fraudulent statements and representations in a [B]id for [M]oving [B]usiness [C]oncerns, for the move of Universal Metal Chain Corporation, in that they *falsely represented that there had been no agreement with any other person to fix the price or to submit a collusive of a sham bid.* (Tr. 415) (Emphasis supplied.)

Moreover, the jury had the indictment and the Bid for Moving Business Concerns (GX 3, 6) with them during their deliberations from which they could read the exact language of the counts and the precise false statement. *United States* v. *Gillilan*, 288 F.2d 796, 798 (2d Cir. 1961). Further evidence that the issue was clearly

drawn for the jury is found in the defendant's direct testimony when his counsel focused on the false statement in the bid forms:

> Q. Mr. Glazer, at the time you signed the bid, was there any false statement in the bid—either the bid of December 12th [GX 3] or in the bid of December 26th [GX 6]? A. There was not.
>
> Q. Were you *a party to any agreement* with any person to fix the price or any part of the price? Yes or no. (Emphasis supplied). A. No.
>
> Q. Did you submit a sham or collusive proposal to bid? A. I did not (Tr. 325-26).

* * * * *

Viewing the charge in its entirety and in the context of the evidence and the defendant's testimony and his failure to object it is clear that the jury was properly instructed as to the elements of the crime charged in Count 7 and the proof needed to establish guilt beyond a reasonable doubt.

POINT II

There was sufficient independent non-hearsay evidence to connect Glazer to the conspiracy.

The defendant claims that the non-hearsay evidence was insufficient to permit the admission of hearsay statements against him.* This claim is without merit.

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* Defendant does not claim that with the hearsay the evidence was insufficient. On this point, without citation, defendant states that Kay and Wagner were unavailable for cross examination (App. Brief p. 22). In fact, defendant never moved to sever Kay so that he could be called as a witness and there is nothing in the record to indicate that he wanted to call either Kay or Wagner or any other defendant who had pleaded guilty.

In order to admit the hearsay evidence of the co-conspirators, Glazer's participation in the conspiracy must be shown by a fair preponderance of the non-hearsay evidence in the Government's case. *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied, sub nom, Lynch* v. *United States*, 397 U.S. 1028 (1970). This burden was clearly met in this case, where the independent evidence established that contrary to his prior unvarying practice Glazer bid on the Universal relocation job without knowing what work had to be performed. Moreover, in the past he had refused to even bid on relocation jobs.

As the non-hearsay evidence demonstrated, Glazer's involvement began with the highly irregular circumstance of receiving the official New York City bid forms from one of his competitors in the moving industry who was bidding on the same job. This entire procedure surprised Glazer's experienced employee Marks, who had never had anything like this happen before, and who had never known Glazer to bid on any relocation job.

As one would expect, Glazer had his expert estimator Marks inspect the Universal site.* Thereafter Marks and Glazer discussed the work to be performed and together decided upon a flat bid of $294,000 or about $50,000 more than Wagner's bid and $25,000 more than Sanford's.

After New York City rejected the three bids Marks received a telephone call from a City employee asking him to rebid the job but this time to delete certain work and to add one building—161 Clymer Street—which was not in the original proposal.

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* Wagner told Green this procedure would be followed to insure that the entire bid fixing operation looked legitimate.

Marks had not previously inspected 161 Clymer Street when he visited the site with Wagner and therefore did not know the size of the building, the nature of its contents or the work required to move the contents. He advised Glazer about the telephone call from the City and Glazer instructed him to prepare a new proposal in conformity with the City's directions. Marks prepared the descriptive proposal and gave it to Glazer who *alone* selected the bid price without any consultation with Marks about the deleted work or the addition of 161 Clymer St.* Glazer's failure to consult with Marks, who was the expert charged with responsibility on the Universal job before selecting a bid price, established that Glazer had no intention of putting in a competitive bid and must have known from some other source what bid price to select to insure he would lose. Support for this was found in Marks' testimony that in the more than two years he was employed by Glazer, Glazer *never* submitted a bid on any other job without having the site completely inspected (or receiving specifications in the mail and none was received on the Universal job). Of course, consistent with Glazer's first high bid and his actions surrounding the selection of the second bid price, the second time Glazer was again the high bidder and Wagner the low bidder.

Thus, the non-hearsay evidence established that Glazer was submitting the highest bids on a type of job he would normally never bid on and he received the bid forms and learned of the job from a competitor who was also bidding on the job and who turned out to be the lowest bidder. Further, contrary to common sense, good business practice and his actions with all prior bid estimates, Glazer's bid was submitted without even knowing the ex-

* Glazer corroborated Marks when he testified that he never knew the extent of work necessary to move the contents of 161 Clymer Street.

tent of the work to be performed. See, *United States* v. *Olweiss*, 138 F.2d 798 (2d Cir.) (L. Hand, J.), *cert. denied*, 321 U.S. 744 (1944); *United States* v. *Cafaro*, 455 F.2d 323 (2d Cir.), *cert. denied*, 406 U.S. 918 (1972). In *Cafaro* where there was less independent evidence than in this case, the Court found that defendant Schulman was a participant in the conspiracy based primarily in the use of a car which had been loaned by Schulman from a friend, a telephone call from Schulman's residence without Schulman being identified as the caller and Schulman's appearance at the final stage of the crime.

In *Olweiss* the conspiracy to defraud a bankrupt rural grocery wholesaler was proved through circumstantial evidence which, as with Glazer, in large part established unusual business procedures indicative of fraud *e.g.* evening deliveries, no book entries, first time use of large volume truck.

There was more than a preponderance of evidence to connect Glazer to the illegal conspiracy and to properly admit the overwhelming hearsay evidence against him.

POINT III

The sentence, which will not subject the defendant to additional incarceration because he is indigent and which is within the statutory maximum, is constitutional and in all respects proper.

A. Indigency

Defendant claims that his sentence is unconstitutional because he will be incarcerated solely due to his inability to pay a fine. This claim is speculative, fails to present an actual case or controversy and furthermore is refuted by defendant's own brief (p. 33) and appendix (Exhibit D).

The issue defendant is seeking to adjudicate is not ripe for decision. The "committed" fine statutes have not yet been applied to Glazer and may never be if he obtains funds to pay the fine before his short prison term is concluded.

To strike down all or part of Title 18, U.S.C. Sections 3565 and 3569, as defendant suggests, would be to "determine the scope and constitutionality [of the statutes] in advance of [their] immediate adverse effect in the context of a concrete case." *International Longshoreman's and Warehouseman's Union Local 37, et al* v. *Boyd*, 374 U.S. 222 (1953). In *Boyd*, the Court refused to find a case or controversy where resident aliens were threatened with the possibility of not being permitted to reenter the continental United States if they went to Alaska, as they had done previously on a regular basis, to take temporary summer jobs.

Defendant's strong desire to have this Court declare Sections 3565 and 3569 unconstitutional cannot make up for the patent failure to state a judicially cognizable case.* The statutes should be left undisturbed until a case arises in which someone suffers or is in immediate danger of suffering some harm.

Glazer's premature attack on the statutes is without merit in any event. The Bureau of Prisons Policy Statement 2101.2A (June 25, 1971) cited by defendant demonstrates that the statutory scheme for "committed" fines will be carried out in conformity with *Tate* v. *Short*, 401

* Perhaps it was this same zeal that led defendant to move in the District Court, and then in this Court, after the District Court's denial, for an order compelling the United States Probation Department to make Glazer's presentence report available for inspection and then, after defendant obtained the full facts on how the fine might be paid, decided to withdraw the motion.

U.S. 395 (1971), and *Williams* v. *Illinois*, 399 U.S. 235 (1970), so that no individual will be incarcerated solely because he is unable to pay his fine. The Bureau of Prisons has tailored its procedures to adhere to and adopt those portions of Sections 3565 and 3569 which meet the constitutional standards of *Tate* and *Williams*.* Accordingly, the defendant will not be incarcerated due to his indigency.**

Defendant is thus asking this Court to declare unconstitutional a statute which if ever applied to defendant will be applied in a constitutional manner, but as of this time has not been applied to him at all.

B. Cruel and Unusual Punishment

The defendant's claims that a $10,000 fine should be vacated as cruel and unusual punishment or that this Court should exercise its supervisory power to vacate the sentence are frivolous.

The established rule is that a sentence within the statutory maximum is usually not reviewable, *Gore* v. *United States*, 357 U.S. 386, 393 (1958), and defendant does not state any convincing reason why this rule should be disturbed here. See, *United States* v. *Brown*, 479 F.2d 1170 (2d Cir. 1973). Noteworthy is the fact that no authority is cited supporting the proposition that this sentence is unconstitutionally severe or that this Court should exercise its supervisory power. All that defendant

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* The 30 day procedure in 18 U.S.C. § 3569 is not used. All that defendant need do at the end of his prison term is sign an oath of indigency and he is released.

** To the extent that defendant is suggesting that a committed fine for an indigent defendant is *per se* unconstitutional this Court should reject such a position. One can readily recognize circumstances in which a defendant, indigent at the time of sentencing, has money to pay a fine at the time his jail sentence terminates. In such a case, a committed fine would protect the Government's recognized interest in collecting fines in criminal cases. *Tate, supra.*

appears to allege is that he disagrees with the Court's conclusion as to the appropriate sentence. See, *United States* v. *Tucker*, 404 U.S. 443 (1972); *United States* v. *Wiley*, slip op. p. 5211, — F.2d —, (2d Cir., July 29, 1975).

In this case the sentence of three months imprisonment and a fine fell far below the possible maximum which could have included up to 5 years imprisonment. The defendant played an indispensable role in this obviously serious white-collar crime which goes to the heart of a competitive bidding system designed to protect millions of dollars of federal and local funds which finance urban renewal projects. This case alone involved bids for close to $300,000.* The deterrent effect of sentencing in this area of criminal activity is undeniably an important and appropriate consideration.**

The sentence, which is within the statutory maximum and which will not cause the defendant to be incarcerated due to his indigency, is constitutional in all respects.

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* If Wagner had been successful at the first bid the contract would have been awarded to him at a price of $250,000 (Tr. 115). When the contract was finally awarded to a legitimate bidder it was for $171,000 (Tr. 44-46), which was even *less* than the City's own "secret" estimate of about $190,000 (GX 8). Thus the bid rigging would have cost the City approximately $80,000.

** In view of the seriousness of the crime and the potential for fraud defendant is totally unjustified in characterizing the sentence as "oppressive". Particularly, in light of counsel's affidavit withdrawing the motion to inspect the presentence report when she learned that reasonable installment payments may be arranged.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the
Southern District of New York,
Attorney for the United States
Of America.

BART M. SCHWARTZ,
T. BARRY KINGHAM,
Assistant United States Attorneys,
Of Counsel.

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

MARIA A. ISRAELIAN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 19th day of September, 1975, he served a copy of the within by placing the same in a properly postpaid franked envelope addressed:

The Legal Aid Society
United States Courthouse
Foley Square
New York, New York 10007
Att: Phyllis S. Bamberger, Esq.

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Maria A. Israelian

Sworn to before me this

19th day of September, 1975.

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977